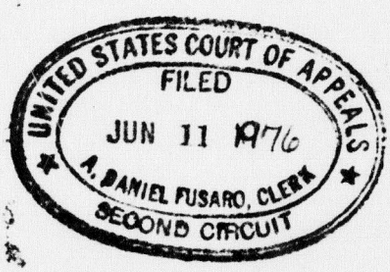
United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



M & T CHEMICALS, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee,

and

HERMAN KORETZKY

Defendant-Appellee.

Docket No. 76-7140

B P/S

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING A MOTION FOR AN ORDER UNDER RULE 4(a), FEDERAL RULES OF APPELLATE PROCEDURE

Reply Brief For Plaintiff-Appellant
M & T Chemicals, Inc.

JOHN A. MITCHELL
530 Fifth Avenue
New York, New York 10036
Attorney for Plaintiff-Appellant

Of Counsel:
Pasquale A. Razzano
530 Fifth Avenue
New York, New York 10036

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DOCKET NO. 76-7140

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING A MOTION FOR AN ORDER UNDER RULE 4(a), RULES OF APPELLATE PROCEDURE

REPLY BRIEF FOR PLAINTIFF-APPELLANT M & T CHEMICALS INC. (M & T)

I

INTRODUCTION

The Appellants' (IBM) brief virtually ignores any fact which shows that M & T took reasonable care to learn of the order of January 9, 1976 denying its motion for reargument which began the running of the time limit for appeal. Indeed, IBM's misleading presentation of the record is best characterized by the argument of IBM concerning the postcard which the Clerk mailed on January 12, 1976 giving notice to the parties concerning Judge Carter's decision which was filed on January 9.

In its brief (IBM 12*) IBM argues that the card sent by the Clerk and received by IBM (A 88) is a basis to infer that the Clerk's postcard "was also mailed to M & T's counsel at a correct address". This flies in the teeth of the fact that the postcard received by IBM was misaddressed to "IBM Corp." and not to its counsel (A 88). The only reason IBM's counsel received the misaddressed card was the fact that it was sent to the same post office

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* Reference to IBM's brief on appeal is made by the designation "IBM" followed by the page number. Reference to M & T's main brief is made by the designation "M & T" followed by the page number. The joint appendix is referenced by the letter "A" followed by the page number.

box which counsel had for an address. This point was fully explained by M & T in its main brief (M & T 11-13). M & T has never contended that the Clerk did not mail the postcard. M & T's contention is that it never received the postcard and the fact that IBM through the use of a common post office box received a misaddressed card is ample evidence that the only reasonable inference one can draw is that the card mailed by the Clerk to M & T's counsel was similarly misaddressed and undeliverable as discussed in M & T's main brief.

II

IBM'S COUNTERSTATEMENT OF THE CASE

The IBM counterstatement of the case is completely misleading. IBM would have the Court believe that counsel for M & T did absolutely nothing to follow the progress of the case after the motion for reargument was filed on December 15, 1975. It would have the Court believe that M & T's counsel took no steps whatsoever to insure that a

timely notice of appeal would be filed.

It ignores the fact that M & T's counsel sought at the same time the motion for reargument was filed to obtain an order of the Court fixing a date certain for the time for appeal to run. It ignores the fact that the attorneys for M & T were continuously following the case in the Law Journal and only because of the double listing of decisions was the notice in the Law Journal of January 13 overlooked.

It clearly misrepresents the reason why attorney Mitchell called Judge Carter's chambers on January 5 to inquire as to the status of the then pending motion for reargument (IBM 5-6). IBM states that "it can logically be inferred that counsel recognized the even greater possibility of such a decision having been rendered ten days later". The true facts are, as Mitchell testified in his affidavit, that he had been away from his office until that date and he wanted to determine personally the status of the pending motion before he personally commenced the daily review of the Law Journal decisions (A 69, 70). The inference which should be drawn

is that counsel was closely following the progress of the case which clearly is beneficial to the position of M & T. Thereafter, as testified to by Mitchell he continuously followed the case in the Law Journal.

IBM contends that there was no in action by M & T from January 5 until the discovery of the entry of the January 9 order on February 19. That is not true. Mitchell and Razzano, two attorneys for M & T, continuously checked the Law Journal for notices of the case.

IBM argues that there was no affidavit from the clerk who would normally have done this in M & T's counsel's office (IBM 18). As testified in the affidavit of Mitchell the following of this decision was not assigned to a clerk, but instead to the two attorneys Mitchell and Razzano "because of the importance to the plaintiff" (A 100). There is no need for an affidavit from a clerk who had nothing to do with this case.

IBM also complains that someone from M & T's counsel's office was actually at the Court on January 15 and February 13 and should have checked into the matter

at that time. The occasion for the January 15 trip was to deposit a copy of the reply memorandum. Since the Law Journal was being followed, there was no reason to check the docket entries since M & T's counsel was under the impression that the case was still being reconsidered by Judge Carter.

As for the February 13 visit, as Mitchell stated in his affidavit, he was in a meeting with another judge of the District Court on that date and that "meeting ended shortly before 5 P.M." (A 100). Obviously, with the ending of the meeting at that time the Clerk's office was closed.

As for the checking of the Law Journal, IBM contends that Razzano, one of the M & T attorneys checking the Law Journal, "was apparently not even aware that Mr. Mitchell was checking the Law Journal until he spoke with Mr. Mitchell on February 19, 1976" (IBM 9). This is a misstatement of what Mr. Razzano stated. It is clear from the Razzano affidavit that he was stating in his affidavit only what Mitchell's practice

was since at the time of Razzano filing his affidavit Mitchell was out of the office and unable to file an affidavit (A 57). After stating that he had contacted Mitchell, he then stated in lawyer like way what Mitchell had stated was his regular practice as to the Law Journal in order that Razzano might make that statement in his affidavit.

Razzano in his affidavit (A 58) candidly stated to the Court that he may have omitted to review the Law Journal on January 13. Clearly this was said because the attorney wished to give the most honest presentation of the facts and he could not recall with exactitude that he actually had reviewed the Law Journal on that date. It appears that IBM would penalize an attorney for being honest and candid with the Court.

A. The Missing Postcard

The argument of IBM concerning the missing postcard is filled with misleading and unfounded inferences (IBM 11-14). The accurate and factual presentation of the postcard incident is accurately and unemotionally set

forth in the M & T main brief (M & T 11-14). M & T relies on that accurate presentation to refute the misstatements and unfounded inferences of IBM

III

ARGUMENT

A. The Principal Issue Before This Court Is Whether Judge Carter Abused His Judicial Discretion

As correctly stated by IBM in its brief, (IBM 14) and as framed in the first issue presented for review by M & T (M & T 2) the first and foremost question which will have to be decided by this Court is whether or not Judge Carter abused his judicial discretion in not finding excusable neglect. To support its position IBM relies on the decision of this Court in Lowry v. The Long Island Rail Road Company, 370 F.2d 911, 912 (2 Cir. 1966). The initially quoted portion of that case relied upon by IBM leaves out the pertinent portion as to why the Court in Lowry* found no excusable neglect. In the

* In the main brief of M & T at pages 18 and 19 reference was made to the decision of In re Josephson. Through error the quotation which was cited there was actually the quotation from In re A. Roth Co., Inc., 125 F.2d 396, 398 (7 Cir. 1942) which was also set forth at pages 22 and 23 of M & T's main brief. The error is acknowledged and any inconvenience to the Court and counsel for IBM is regretted. The quote intended to be relied upon is that which is found at the IBM brief at page 15 and in the above quoted portion of the Lowry decision.

interest of completeness we will repeat the full pertinent quotation.

> "The sole question before us on the appeal from denial of the petition for extension is whether the denial was an abuse of judicial discretion. In Carroll v. American Federation of Musicians, 295 F.2d 484, 488 (2d Cir. 1961), we approved Chief Judge Magruder's formulation of the definition of abuse of discretion in In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954):
>
> > ''Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'
>
> We fail to find any such clear error of judgment here. Counsel points to no justification for the final 16-day delay, which seems to demonstrate a complete disregard for the purpose of the Rules to require prompt action on appeals. On the record before us we cannot say that the neglect was clearly excusable."

In Lowry, the order which began the time for appeal was entered on May 4. On June 13, forty days later, appellant's attorney learned of its entry. He did nothing until June 29, sixteen days later, when a petition for an

extension of time in which to appeal was filed. The Court found that there was "no justification for the final 16-day delay pointed out by counsel". The Court also stated that the District Judge "[I]n the absence of any explanation whatever of the 16-day delay after June 13 *** refused to find neglect and denied the extension." 370 F.2d at 912. In Lowry there was no attempt made by the attorney to justify his failure to take action after learning that the time for appeal had expired. In the present case not only was every reasonable effort made to follow the progress of the motion pending before Judge Carter, but its petition was filed one day after learning of the order entered on January 9. Lowry involved an issue not present in this case.

B. M & T's Counsel Did Discharge Their Affirmative Duty To Follow The Progress Of The Case

IBM contends that the M & T's counsel did not discharge their affirmative duty to follow the progress of the case. This is not true. The attorneys did consistently follow the Law Journal. This is the standard technique used in the Southern District of New York to insure that notices

concerning a pending case will be obtained. It was only because of the double entry of decisions on January 13 that the notice in the Law Journal was overlooked. The memorandum filed with the Court on January 15 was part of the unique circumstances of this case which led the M & T attorneys to believe that the motion for reargument was still under consideration by the Court.

IBM does not wish to speak to the merits of the motion for reconsideration, but in the opinion of M & T's attorneys the questions raised by the motion were of a sufficiently important nature to cause Judge Carter to give serious consideration to the motion for reargument.

IBM would have the Court believe that nothing was done during a nine and one half weeks period following the filing of the motion for reconsideration other than to make one phone call to the Court's chambers.

It ignores the fact that the Court was asked to grant an extension to a day certain so that the time for appeal would not run out as did occur in this matter. Further, two attorneys checked the Law Journal. Razzano in being candid stated that he may have overlooked the decision or forgot to check that day. He did not say that he did not check the Law Journal, it was simply a

case that he could not swear that he actually did it. That was not the case with Mitchell. He did check it.

The reason for having the docket checked in Mitchell's note to Razzano was that the memorandum filed on January 15 was then going to be pending approximately thirty days and, as a precaution, the docket entries were to be reviewed to assure that a decision had not been overlooked.

These steps were sufficient to show that M & T's counsel did discharge their affirmative duty to follow the progress of the case. Indeed, IBM has not been able to point to a case where excusable neglect was denied to a party who had no actual notice and whose counsel made an effort similar to that found in the present case.

C. The District Court's Decision Is Not Consistent With Other Decisions In This Circuit

In its brief IBM states that the M & T argument to the effect that: "Denial of Excusable Neglect Requires A Finding Of Actual Notice" is an incorrect statement of the law (IBM 23). It then relies on the decision in Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10 Cir. 1971) for the proposition that no notice was sent to counsel for the parties and the Court Of Appeals denied the appellants' appeal, finding that they had not discharged their affirmative duty of following the progress of the case. In the Lathrop case the judgment was entered on June 5, 1969. Post trial motions were timely filed and later denied on August 15, 1969. No notice was sent by the Court to the parties. On January 28, 1970 one

of the attorneys for the appellants visited the Court and received actual notice of the denial of the motions. This was five months after the denial. On February 27, 1970 a request was made to the Court to withdraw the August order and reenter it as of January 28, 1970. A notice of appeal was filed on February 27, 1970.

On its facts the Lathrop case had nothing to do with the issue of excusable neglect. It had nothing to do with the enlargement of time to file an appeal. It is a case which was concerned with a request to the Court to withdraw its order of August 19, 1969. There is no way that the appellants in the Lathrop case could have asked for an extension of time in which the District Court could have granted the limit of a thirty days extension on the finding of excusable neglect during which the appellants could appeal. Too many

months had simply passed by. Further, appellants apparently made no attempt to explain what they were doing to follow the case during those five months. Obviously, IBM found no case in this circuit in which excusable neglect was denied where the moving or appealing party had no actual notice.

Further review of the cases does disclose one possible case, Lowry v. The Long Island Rail Road Company, 370 F.2d 911, 912 (2 Cir. 1966), which may have involved no notice to the appellant. As noted in the opinion of the Court Of Appeals, the District Court expressed some doubt on the question but assumed there was no notice. However, as explained, supra, in Lowry the key in that case was an "absence of any explanation whatever of the 16-day delay", after learning of a final order entered 40 days earlier before filing a petition for extension of time in which to appeal. In the present case there was no delay in filing. Except for the Lowry

case, it appears that excusable neglect has only been denied in cases where a party had actual notice.

M & T did not have actual notice until February 19.

Even in Brahms v. Moore-McCormack Lines, Inc., 21 F.R.Serv. 73a. 54 Case 1 (SDNY 1955) so heavily relied upon by IBM in its brief (IBM 24) the card from the Clerk's office was actually received by the plaintiff's attorney but misfiled. IBM relies on Brahms for the proposition that counsel must search all other files in their office to prove a card was not misfiled. IBM argues that no such search was made by counsel for M & T.

The record in this case clearly shows that M & T's attorneys did search the pertinent file and did inquire from personnel within the office as to whether or not a card was found (A 58). IBM makes the unfounded accusation that "M & T's counsel

have apparently chosen not to look for the Clerk's notification card in any files other than the file of the instant litigation, presumably to avoid the consequences of the Brahms decision by leaving the issue of 'misfiling' open to conjecture" (IBM 24-25). Such an accusation is unfounded, unreasonable and simply false.*

The record in this case as to the misaddressed postcard is based primarily on the actual card received by IBM (A 88). It shows that the only logical inference is that the Clerk's card intended for M & T's counsel was misaddressed and not delivered.

D. The Facts In The M & T Affidavits Are Uncontroverted

IBM makes the contention that "Unless M & T agrees with IBM's counterstatement of the facts,

* While it is outside the record of this appeal a search has been made of other files to see if the Clerk's card was misfiled. None was found. Counsel who will be arguing the appeal will make this averment in open Court if IBM wishes him to do so.

it is apparent that there is a major controversy as to the facts surrounding M & T's failure to file a timely appeal" (IBM 16). It is clear that IBM has confused "facts" with "argument". The facts stated in the M & T affidavits and contained in the varous exhibits were not controverted by IBM. IBM may argue how the facts should be weighed by the Court or what inferences should be drawn but it cannot change these facts by formulating a counterstatement.

Since the facts, per se, are not in dispute, this Court is in as good a position as the District Court to determine if there was excusable neglect.

CONCLUSION

In view of the unique circumstances in this case, it is believed that it is one of the rare cases where abuse of discretion can be found.

For the foregoing reasons as well as those set forth in the main brief of M & T it is requested

that the order of the District Court be reversed, excusable neglect be found and the time for M & T to file a notice of appeal be enlarged pursuant to Rule 4(a), Federal Rules Of Appellate Procedure.

Respectfully submitted,

John A. Mitchell
Attorney for Plaintiff-Appellant
530 Fifth Avenue
New York, New York 10036

Of Counsel:

Pasquale A. Razzano
530 Fifth Avenue
New York, New York 10036

CERTIFICATE OF SERVICE

Two copies of the reply brief of plaintiff-appellant, M & T Chemicals, Inc., were mailed this 11th day of June 1976, by first class mail postage prepaid to the following attorneys for defendants-appellees:

Elliott I. Pollock, Esq.
Pollock, Philpitt & VandeSande
Suite 904 Ring Building
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

Murray Nanes, Esq.
IBM Corporation
P.O. Box 218
Yorktown Heights, New York 10598

John A. Mitchell